ORIGINAL

No. 83-6097

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROGER KEITH COLEMAN,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERRTIORARI

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QUESTION PRESENTED

WHETHER THE TRIAL COURT'S ACTION IN REFUSING TO ORDER A CHANGE OF VENUE IN PETITIONER'S TRIAL ON CHARGES OF CAPITAL MURDER AND RAPE DENIED PETITIONER'S RIGHT TO TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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PRELIMINARY STATEMENT

The Commonwealth of Virginia, the respondent herein respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia entered in this case on April 23, 1982, not be granted.

For purposes of uniformity, the parties will hereinafter be referred to as the petitioner and the Commonwealth, and all page references will be to the joint appendix filed in the Supreme Court of Virginia by the petitioner and the Commonwealth and designated (App. ___).

OPINION BELOW

The opinion of the Supreme Court of Virginia affirming the judgment of the Circuit Court for the County of Buchanan was rendered on September 9, 1983, and is reported as 226 Va. ___, 307 S.E.2d 864 (1983).

JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3)

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional provisions involved in the instant case are

set forth in the petition for a writ of certiorari.

STATEMENT OF THE CASE

On March 18, 1982, a jury in the Circuit Court of Buchanan County, Virginia, convicted petitioner of capital murder and rape. On that same date, the jury fixed his punishment for rape at confinement in the penitentiary for life, and, on March 19, 1982, imposed the death penalty for capital murder. On April 23, 1982, after considering the post-sentence report, the Circuit Court imposed the death penalty in accordance with the jury verdict. (App. 200-207). Petitioner's petition for a writ of error on the rape conviction was denied by the Supreme Court of Virginia on September 9, 1983. See petition for writ of certiorari at App. 30). Petitioner's conviction for capital murder and the death sentence were affirmed on appeal by the Supreme Court of Virginia on September 9, 1983. Id at App. 29. A petition for a rehearing was denied by the Supreme Court of Virginia on October 14, 1983. Id. at App. 31.

Wanda Fay McCoy, a resident of Grundy, Virginia, was last seen alive by her husband on the morning of March 10, 1981. When he returned home from work that evening he found his wife in the bedroom on the floor with her throat slashed and two stab wounds in the chest. (App. 599-601).

An intense investigation was undertaken by the local law enforcement authorities and evidence linking petitioner to the crime consisted of semen found in the vaginal cavity of the decedent which was the same type as defendant's secretion type. (App. 759). The petitioner, on the night of the crime, wore jeans which had blood stains of the same type as the decedent's blood type. (App. 775-176). Two hairs were found in the pubic area of the victim which was consistent with those of the petitioner. (App. 758). A cell mate of the petitioner at the local county jail testified that the petitioner admitted to him that he was present when the victim was killed and that he raped her, although he did not actually kill her, (App. 855-857). The defendant was the victim's brother-in-law (App. 925), and the evidence indicated that she was killed by someone she knew since

there was no forced entry into the residence. (App. 513).

The petitioner was arrested on April 13, 1981, more than a month following the crime. On October 20, 1981, the petitioner filed a motion for a change of venue See Petition for Writ of Certiorari, App. at 32 . On December 2, 1981, a hearing was held before the Court in which petitioner introduced five newspaper articles from The Virginia Mountaineer in support of his motion for a change of venue, (App. 120). The Commonwealth introduced affidavits supporting their contention that petitioner could receive a fair and impartial trial in that jurisdiction, App. 120). The motion was denied by the Court by order dated January 5, 1982, (App. 120). Evidence regarding a sign that appeared at a service station in Grundy sometime in early 1982, was not offered by way of sworn testimony or affidavit on the issue of change of venue. This statement appeared in a letter which was written by petitioner to the trial court judge dated February 15, 1982. (App. 123-125).

The motion for a change of venue was renewed at the beginning of petitioner's trial on March 15, 1982, and denied (App. 246-250). Although the Court again denied the motion, it stated that it would grant the petitioner much leniency to go through with the individual voir dire of every jury on the panel of 20. Moreover, the Court gave assurances that if the voir dire so justified the Court would consider another renewal of the motion. (App. 250). Extensive voir dire was conducted, and counsel for the petitioner moved the Court to strike one juror for cause which was done on the basis that the juror did not fully understand the presumption of innocence. (App. 278-80). Counsel for petitioner made no other motions to strike for cause and did not renew the motion for a change of venue.

REASONS FOR DENYING THE WRIT

THE TRIAL COURT'S ACTION IN REFUSING TO ORDER A CHANGE OF VENUE OF PETITIONER'S TRIAL DID NOT DENY THE PETITIONER HIS RIGHT TO A FAIR AND IMPARTIAL JURY AND THIS CASE PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

Petitioner argues that the Court should have granted his motion for a change of venue because "there can be no question in

the present case that the community atmosphere in Buchanan County, Virginia, was inflamed with anger and outrage directed at the petitioner." (See Ppetition for Certiorari at 5). He bases his assertion on five articles that appeared in a local newspaper related to these charges as well as an unrelated charge of indecent exposure and prior convictions of the petitioner; a large sign purportedly posted at one of the town's service stations which read, "Time for Another Hanging in Grundy;" alleged threats against petitioner which caused the trial judge to have petitioner held in a neighboring community jail; and the actions of the trial judge in ordering spectator search and personally searching the jury room before permitting the jury to retire there.

The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). However, qualified jurors need not be totally ignorant of the facts and issues involved in a case:

> In these days of swift widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard

366 U.S. at 722, 723

However, a juror's assurances that he is impartial cannot be dispositive of the rights of the accused where the accused can demonstrate the actual existence of an opinion in the mind of the juror as will raise the presumption of partiality. Murphy v. Florida, 421 U.S. 794 (1975).

Petitioner concedes that the record does not reflect any actual bias on the part of any of the jurors who were seated, (See Petition for a Writ of Certiorari at 6). However, such indicia of impartiality can be disregarded in a case where the general atmosphere in the community is sufficiently

inflammatory. The circumstances of this case do not fall in that category despite petitioner's attempts to characterize them as such by referring to newspaper articles, threats against the petitioner and a sign at a local gas station stating it was "time for another hanging in Grundy." Petitioner presented five newspaper articles at trial and presents four in this petition (Petition for Writ of Certiorari App. at 33-36). One article was written on April 16, 1981, April 23, 1981, one appears to have been written during the week of August 14, 1981, and there is nothing in the fourth to indicate the date it was written. Petitioner was not tried until March, 1982 and the articles were largely factual in nature. Pre-trial publicity was never intensive, extensive, or inflammatory, and most of the publicity that did occur occurred approximately 7 months prior to trial. Beck v. Washington, 369 U.S. 541 (1962), reh. den. 370 U.S. 965 (1962).

Another factor in determining whether pervasive prejudice exists in a community is a number of veniremen who will admit to a disqualifying prejudice. When you have a case in which most of the veniremen will admit to prejudice, the reliability of the others denials of such prejudice may be drawn into question. It is more probable that they are part of a deeply hostile community. Murphy v. Florida, at 803.

In Irvin v. Dowd, the Court noted that 90 percent of those examined on the point were inclined to believe that the accused was guilty and that the Court had excused for this cause 268 of the 430 veniremen. 366 U.S. at 727. In Murphy v. Florida, supra, 20 of the 78 people questioned were excused because they indicated an opinion as to petitioner's guilt. 421 U.S. at 803. In distinguishing Murphy from Irvin, this Court stated "This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiments so poisoned against the petitioner as to impeach the indifference of jurors who displayed no animus of their own" 421 U.S. at 803. Again, in Dobbert v. Florida, 432 U.S. 282 (1977), the Court refused to presume pervasive prejudice where 78

prospective jurors were interviewed and petitioner exercised only 27 of his 32 peremptory challenges. Id. at 302.

In this case, of 42 prospective jurors, the trial court excused 14 because they had formed an opinion as to guilt or innocence and 8 because they were unwilling to impose the death penalty under any circumstances (Petition for Writ of Certiorari App. at 15). This can hardly be said to reflect inherent prejudice against the petitioner. Extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Murphy v. Florida, supra.

In support of his position, petitioner relies principally upon Irving v. Dowd, supra; Rideau v. Louisiana, 373 U.S. 723 (1963); and Sheppard v. Maxwell, 384 U.S. 333 (1966. Under the circumstances in each of these cases, prejudice was presumed and the state convictions were overturned by this Court because they were obtained in a trial atmosphere that "had been utterly corrupted by press coverage" Murphy v. Florida supra.

In Irvin, the rural community in which the trial was held had been subjected to an extreme amount of inflammatory publicity immediately prior to trial including defendant's confession to 24 burglaries and 6 murderers, which included the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence. Eight of the twelve jurors that sat in his case had actually formed an opinion that he was guilty before the trial began. In Rideau the defendant confessed under police interrogation to the murder with which he was charged. A twenty minute film of his confession was broadcast three times by a television station in the community where the crime had been committed. Similarly, Sheppard arose from a trial infected not only by a background of extremely inflammatory publicity, but also to a carnival atmosphere during the trial. In reversing conviction in Rideau, the Court did not examine the voir dire for evidence of actual prejudice, because it considered the trial under review "but a hollow formality" in view of the thousands of people who had seen and heard defendant admit his guilt before

cameras. Id. at 326.

The cases relied upon by the petitioner "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." Murphy v. Florida, at 799.

In order for a state court conviction to be overturned in cases of this nature, the petitioner must show by a totality of the circumstances that his state court conviction was obtained in a trial atmosphere that had been "utterly corrupted by press coverage." Murphy v. Florida, at 798; Dobbert v. Florida, at 303. Petitioner in this case has failed to show extensive publicity of an inflammatory nature. He has directed us to no specific portions of the record particularly the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected.

Petitioner alleges that the Virginia Supreme Court failed to inquire whether the inflammatory community context within which the trial took place required a change of venue. The Commonwealth disagrees. The Court specifically held that "the record fails to show any widespread prejudice against the defendant in the jurisdiction where the crime was committed (Petition for Writ of Certiorari App. at 16). Moreover, the Supreme Court of Virginia did not decide this issue in a way that would conflict with the decision of another state court of last resort, a federal court of appeals or the decisions of this Court.

CONCLUSION

For the reasons presented by the Commonwealth of Virginia, the respondent herein respectively contends that the issues raised in this case are neither important nor substantial and that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that I, Jacqueline G. Epps, Senior Assistawnt Attorney General of Virginia am a member of the bar of this Court and that on the 15TH day of February,1984, mailed with first class postage pre-paid. three copies of the foregoing respondent's brief in opposition to granting a writ of certiorari to Edward M. Wayland, Esquire, Wayland & Williams, 801 East High Street, Charlottesville, Virginia 22901, counsel for the petitioner.

Jacqueline G. Epps
Senior Assistant
Attorney General

MAILING CERTIFICATE

I, Jacqueline G. Epps, a member of the bar of this Court, make oath that on the 15th day of February, 1984, I deposited this Brief in Opposition to Petition for Writ of Certiorari in a United States Post Office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States.

Jacqueline G. Epps

STATE OF VIRGINIA,
City of Richmond, to-wit:

The foregoing mailing Certificate was subscribed and sworn to before me, a Notary Public, this 15th day of February, 1984.

Notary Public

My commission expires: 9.14.87